NEW YORK LAW SCHOOL

NYLS Journal of Human Rights

Volume 13
Issue 4 *SPECIAL ISSUE 1997*

Article 8

1997

FACT PATTERN: THE 21ST ANNUAL ROBERT F. WAGNER, SR. NATIONAL LABOR LAW MOOT COURT COMPETITION

Steve Klein

Andrea Barton Reeves

THE 21ST ANNUAL ROBERT F. WAGNER, SR. NATIONAL LABOR LAW MOOT COURT COMPETITION

FACT PATTERN

Steve Klein & Andrea Barton Reeves

A Note on the Format

The Wagner Competition Fact Pattern contains one fictitious arbitration decision and three fictitious federal court opinions. Citations in the opinions follow formatting specifications for Court Documents and Legal Memoranda in *The Bluebook*, 16th ed.

THE AMERICAN UNION OF COLLEGE PROFESSORS, LOCAL 522 v. PUERTA PACIFIC COLLEGE

Decided by Arbitrator Isaac Washington

March 14, 1996

SUMMARY OF DECISION: The American Union of College Professors (the "Union" or "AUCP") brings this action on behalf of Julie McCoy, who was terminated by her employer, Puerta Pacific College (the "College"). The Union alleges that the College's salary structure ("Profit Plan" or "Plan") violates the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623 (1994), because it has a disparate impact on older professors. The union and the employer have been unable to resolve this statutory-rights issue through the grievance process outlined in the collective bargaining agreement, and each has agreed to resolve this issue by arbitration. Article forty-seven of the collective bargaining agreement allows statutory disputes to be brought to arbitration. No other issues are before me for decision. I find that the ADEA does not recognize disparate impact claims. I therefore deny Ms. McCoy's demand for backpay and reinstatement.

ISSUES PRESENTED: Does the Profit Plan have a disparate impact on older professors, and thus violate the ADEA? If so, what shall the remedy be?

FACTUAL BACKGROUND

Julie McCoy, forty-seven, is a twenty-year law enforcement veteran. After graduating from Wagner State College in 1974, Ms. McCoy began as a rookie in the Wagner City Police Department. Ms. McCoy demonstrated an unusual talent for police work, and she quickly rose through the ranks to become a sergeant in 1982. As a sergeant, Ms. McCoy supervised three officers and carried a full case-load of her own. Ms. McCoy also taught courses at the Wagner Police Academy on basic crime fighting skills, collecting evidence, and testifying in court, but her real love and specialty was forensics. In 1987, Ms. McCoy became a certified forensics expert and taught courses in crime-scene analysis and evidence processing at the State Trooper Academy and other police departments around the state.

After several years of varied duties, Ms. McCoy was anxious to find a less stressful job, particularly one that allowed her to use her extensive law-enforcement background and relieved her of her supervisory responsibilities. Throughout her career with the police department, Ms. McCoy turned down offers of employment as a full-time professor from several colleges throughout the country. One school in particular, Puerta Pacific College, a private institution in the State of Wagner, invited Ms. McCoy to speak as a guest lecturer at its School of Criminal Justice.[1] Ms. McCoy developed a strong professional relationship with Sylvia Spelling, the President of the College, and began to think about teaching at the College. President Spelling, impressed with Ms. McCoy's educational background and extensive experience, encouraged Ms. McCoy to contact her if she ever considered leaving police work to teach. In July 1995, Ms. McCoy began to reconsider President Spelling's offer and decided to call her to see

---

[1] The Puerta Pacific School of Criminal Justice is part of the College, a large, multi-campus institution founded in 1925. In 1972, the College expanded by purchasing several smaller colleges and community colleges in the area. As part of its expansion, the College's Board of Trustees opened the School of Criminal Justice in 1984.

whether a position was available at the college.

In 1989, like many other colleges and universities throughout the country, the College experienced a significant downturn in applications and student enrollment. In 1991, as the downward enrollment trend continued, the College was forced to discontinue several degree programs and lay off 250 members of its faculty and staff, most of whom were in the School of Criminal Justice. Although the College has been able to increase its hiring in recent years, the College's Board of Trustees unanimously voted in January 1994 to institute an austerity plan, known as the "Profit Plan," to avoid significant layoffs in the future. Part One of the plan involved creating "Fund 2000," an endowment fund with a goal to raise $5 million by the year 2000. So far, the College has raised $3.7 million, $1.2 million of which is earmarked to "attract professors."[2] Part Two of the Plan is the part in controversy today. Part Two includes a salary structure that links years of experience to salaries paid to newly hired professors. (A copy of this plan is contained in the appendix to this decision.) According to the Plan, new professors are to be hired at a point no higher than Step 2, at which a professor with a maximum of 5 years experience in teaching or in law enforcement and holding only a bachelor's degree is paid no more than $28,000 per year for the first year of employment.

The College created this Profit Plan without the input of the union, the American Union of College Professors. Founded in 1954, AUCP has represented the faculty and staff at the College only since August 1994, when the Union won its election by five votes. The Union began organizing at the College at the behest of several professors who believed that the new salary structure severely restricted hiring new, experienced professors and unnecessarily limited the pay of older professors. The relationship between the College and AUCP has

---

[2] President Spelling testified that the funds will be used to endow two department chairs and help to attract three prominent visiting professors. Although the funds may be used to hire new associate professors, Part One of the Profit Plan was not created for that purpose.

generally been cordial. The collective bargaining agreement, into which the salary structure has been incorporated with the Union's consent, covers all faculty employed by the College, including tenured and non-tenured professors.

After the 1991 layoffs, a number of professors left the College to find more secure employment. Since that time, the College has found it difficult to attract new professors. At the start of the 1995-1996 academic year, one position still remained open at the School of Criminal Justice. The Puerta Pacific College Search Committee advertised for the position of Assistant Professor of Criminology in the Wagner Gazette, a local newspaper in the City of Wagner. Ms. McCoy applied for the job and interviewed with President Spelling. Ms. McCoy was hired for the job at Step 7, a permanent position, at a starting salary of $53,000 per year. Ms. McCoy began teaching in September 1995. In the interim, the search committee continued to look for a candidate to fill the position. In October 1995, the College hired Vicki Stubing, twenty-eight, as an Assistant Professor of Criminology. Ms. Stubing had two years experience as a patrol officer with the Puerto Vallarta Police Department and held a bachelor's degree in criminal justice from John Jason College of Criminal Justice in New York City. Ms. Stubing was hired at a salary of $27,000 per year. The College terminated Ms. McCoy when Ms. Stubing was hired, citing Part Two of the Profit Plan.

After the College terminated Ms. McCoy, she approached Berle Smith, her shop steward, about filing a grievance against the College. Ms. McCoy explained that the College violated the ADEA because its Profit Plan discriminated against teachers with experience similar to hers, most of whom would be over forty. The Union decided to file a grievance on behalf of Ms. McCoy, alleging discriminatory practices by the College that violated the ADEA. Ms. McCoy also filed a charge with the Equal Employment Opportunity Commission (EEOC), alleging that the College engaged in practices that violated the ADEA. The EEOC conducted an investigation and declined to sue on her behalf, but issued Ms. McCoy a right-to-sue letter.

DISCUSSION

Ms. McCoy alleges that Part Two of the College's Profit Plan violates the ADEA because, she claims, it has a disparate impact on experienced professors, many of whom are over forty. In establishing a prima facie case of disparate impact, a plaintiff must prove that the employment practices challenged fall more harshly on a protected class than on a non-protected class. Geller v. Markham, 635 F.2d 1027, 1031 (2d Cir. 1980). Disparate impact theory has long been established as a basis for liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1994), which prohibits discrimination based on race, color, sex, religion, and national origin. See Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971). I find, however, that disparate impact theory of discrimination is not applicable to the ADEA, and I deny Ms. McCoy's demand for reinstatement and backpay.

AUCP makes several arguments in an attempt to persuade me that the theory of disparate impact liability applies to the ADEA. First, it argues that the virtually identical language in the ADEA and Title VII shows that Congress intended that disparate impact claims be permitted under the ADEA. AUCP points to language in Title VII that the Supreme Court has interpreted to permit disparate impact claims[3] and compares it to § 623 (a)(2) of the ADEA, which makes it unlawful for an employer "to limit, segregate, or classify his employees in a way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. § 623 (a)(2) (1994).

Although similarities exist between the language of the ADEA and Title VII, these similarities do not lead to the conclusion that disparate impact liability exists under the ADEA. The appropriate focus should be on the correct reading of the statutory language. As some

---

[3] See 42 U.S.C. § 2000e-2 (a)(2) (1994); see also Griggs v. Duke Power Co., 401 U.S. at 428 (finding that Title VII's objective is to bar discriminatory employment practices, even practices "neutral in terms of intent").

courts have noted, the correct reading of § 623 (a)(2) of the ADEA only "prohibit[s] limiting, segregating, or classifying employees because of age," and does not permit a disparate impact claim to be raised under the statute.[4] See, e.g., Di Biase v. SmithKline Beecham Corp., 48 F.3d 719, 732 (3d Cir. 1995) (noting that "the statutory language [of the ADEA] does not explicitly provide for disparate impact liability"). This interpretation allows only a disparate treatment claim, not a disparate impact claim alleging intentional discrimination under the ADEA. See Hazen Paper Co. v. Biggins, 507 U.S. 604, 608 (1993) (declining to decide whether disparate impact applies to the ADEA, noting that "the disparate treatment theory is . . . available under the ADEA *as the language of that statute makes clear*"). (emphasis added).

AUCP further argues that the ADEA's legislative history proves that Congress intended that disparate impact claims be permitted under the ADEA, as they are under Title VII. The ADEA, AUCP asserts, was intended to rid the workplace of all forms of discrimination against older workers, just as Title VII was intended to eliminate discrimination based on race, color, religion, sex, and national origin. The Union reasons that if Congress intended that Title VII and the ADEA accomplish the goal of eliminating discrimination in the workplace, then Congress must have intended that the same causes of action be available under the ADEA and Title VII.[5]

Although this is an appealing argument, I am unwilling to assume congressional intent regarding the ADEA and Title VII absent evidence. See Lorillard v. Pons, 434 U.S. 575, 579 (1978) (rejecting petitioner's argument that similarities between ADEA and Title VII demonstrates Congress's intent to deny jury trials under the ADEA"); see also Hazen Paper, 507 U.S. at 608 ("[D]isparate treatment . . . captures

---

[4] Evan H. Pontz, Comment, *What a Difference ADEA Makes; Why Disparate Impact Theory Should Not Apply to the Age Discrimination in Employment Act*, 74 N.C. L. REV. 267, 292 (1995).

[5] *See* Heidi Borgny Supple, Comment, *Is Silence Really Golden? The Seventh Circuit's Application of Disparate Impact to the ADEA*, 79 MARQ. L. REV 833, 841 (1996).

the essence of what Congress sought to prohibit in the ADEA.")

In fact, recent congressional activity shows that Congress did not intend that disparate impact apply to the ADEA. In 1991, Congress passed the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 2000e-2 (1994)) to reinstate disparate impact analysis under Title VII after the Supreme Court severely limited that analysis. Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 659 (1989). While Congress amended Title VII, it failed to amend the ADEA to authorize disparate impact liability specifically.[6] If Congress had intended to allow disparate impact under the ADEA, it probably would have done so explicitly as part of the Civil Rights Act of 1991. Determining unarticulated legislative intent is a difficult task, at best. See Lorillard, 424 U.S. at 585 ("We are not unmindful of the difficulty of discerning congressional intent where the statute provides no express answer.") Without such an intent deliberately enunciated by Congress, I am reluctant to find that Congress intended to allow disparate impact claims under the ADEA.

This arbitrator is also persuaded by the Supreme Court's ruling in Hazen Paper, 507 U.S. at 608, that disparate impact liability does not exist in ADEA cases. Although the Hazen Paper Court did not decide whether disparate impact analysis applies to the ADEA, the Court reasoned that the ADEA was enacted to prohibit inaccurate stereotyping of the elderly, not to address all employment practices that have an adverse impact on older workers. Id. at 609. The Court stated in Hazen Paper that "[w]hen the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age." Id. at 610; see also EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1076 (7th Cir. 1994). Hazen Paper's rationale is applicable in this case. Here, the College's salary structure is wholly motivated by the College's need to manage salary costs. The Profit Plan is structured to consider years of service, not a candidate's age. As such,

---

[6] Pontz, supra note 4, at 302.

Part Two of the Profit Plan does not discriminate against older candidates. The Hazen Paper Court repeatedly stressed that "an employee's age is analytically distinct from his years of service." 507 U.S. at 610. Accepting the Union's argument that age and years of service are linked, therefore casting the College's salary structure as one having a disparate impact on all older candidates, would make the Court's rationale in Hazen Paper a nullity.

There is, therefore, ample precedent to support a finding that disparate impact is not an appropriate claim under the ADEA, and I will not recognize it as a viable claim in this case.

THEREFORE, IT IS THIS ARBITRATOR'S FINDING that disparate impact is not applicable to ADEA claims. Ms. McCoy's demand for backpay and reinstatement is hereby denied.

MARCH 14, 1996.

/s/_____
Isaac Washington
Arbitrator

APPENDIX

PUERTA PACIFIC COLLEGE PROFIT PLAN - NEW HIRES
+ $2000 added for all candidates with a Masters Degree
+ $4000 added for all candidates with a Ph.D.

Step	Candidate Qualifications	Salary Range
1	less than 2 years teaching experience in a community college, technical college, or 4-year degree-granting institution OR 1-2 years relevant work experience AND a Bachelor's Degree	24,000 - 28,000
2	2-4.5 years teaching experience in a community college, technical college, or 4-year degree-granting institution OR 2-3 years relevant work experience AND a Bachelor's Degree	29,000 - 32,000
3	5-7 years teaching experience at a community college, technical college, or a 4-year degree-granting institution OR 3-5 years relevant work experience AND a Bachelor's Degree	33,000 - 37,000
4	7-9 years teaching experience at a community college or a 4-year degree-granting institution OR 5-8 years relevant work experience AND a Bachelor's Degree	38,000 - 42,000

PUERTA PACIFIC COLLEGE PROFIT PLAN - NEW HIRES - page 2

5	9-11 years teaching experience at a community college or a 4-year degree-granting institution OR 8-12 years relevant work experience AND a Bachelor's Degree	43,000 - 47,000
6	11-15 years teaching experience at a community college or a 4-year degree-granting institution OR 12-15 years relevant work experience AND a Bachelor's Degree	48,000 - 52,000
7	15-22 years teaching experience at a community college or a 4-year degree-granting institution OR 15-25 years relevant work experience AND a Bachelor's Degree	53,000 - 57,000
8	22-26 years teaching experience at a community college or a 4-year degree-granting institution OR 25-35 years relevant work experience AND a Bachelor's Degree	58,000 - 62,000

UNITED STATES DISTRICT COURT
DISTRICT OF WAGNER

----------X

JULIE McCOY,

Plaintiff,

v.

Docket No.
96 Civ. 424 (C.C.C.)

PUERTA PACIFIC COLLEGE,

Defendant.

----------X

C.C. Charo, District Judge:

INTRODUCTION

Plaintiff, Julie McCoy, brings this action under the Age Discrimination in Employment Act of 1967 § 2, as amended, 29 U.S.C. § 623 (1994) ("ADEA"). Defendant, Puerta Pacific College (the "College"), hired Plaintiff as a professor in September 1995 but terminated her one month later, after hiring a younger professor at a lower salary. Plaintiff claims that Defendant's policy of refusing to hire people above a certain salary grade has a disparate impact on older workers. Before filing this claim, the American Union of College Professors ("AUCP"), representing Plaintiff, filed a grievance and submitted the dispute to arbitration. On March 14, 1996, the arbitrator found that there was no violation of the ADEA. Meanwhile, Plaintiff sought and received a "right-to-sue" letter from the Equal Employment Opportunity Commission ("EEOC") and filed this claim shortly thereafter. The parties agreed to a bench trial and have stipulated to the facts contained in the Arbitration decision of March 14, 1996. I adopt

those facts in their entirety. With the consent of the parties, this Court, however, has considered additional facts not addressed by the arbitrator but which the parties submitted to the arbitrator.

JURISDICTION

Defendant asserts that this Court lacks jurisdiction to hear this matter because, according to Defendant, Plaintiff agreed to submit statutory claims to binding arbitration and has received a full and fair hearing through the arbitral process.[1] As a threshold issue, therefore, I must determine whether a union can contractually oblige employees to binding arbitration of statutory rights disputes. The collective bargaining agreement between the Union and the College reads, in pertinent part:

ARTICLE 21.

2. All parties hereto shall comply with all federal, state, and local statutes and regulations proscribing discrimination.
   (a) In addition to those forms of discrimination addressed by said statutes and regulations, the parties hereto expressly agree not to discriminate, in any manner, against any person, on the basis of race, color, sex, religion, age, national origin, physical or mental handicap, or sexual orientation.

. . . .

---

[1] Defendant presented its defense by a motion under rule 12 of the Federal Rules of Civil Procedure. In the interests of judicial economy, the parties and I agreed that I would decide Defendant's motion, together with the ADEA issue, in my decision following the bench trial.

ARTICLE 47.

1. All disputes not settled pursuant to any grievance procedure provided for herein shall, at the request of either party, be referred to final and binding arbitration.
2. The parties expressly agree that the arbitrator shall have jurisdiction to decide any claims that a party has violated any federal, state or local anti-discrimination statute, including, without limitation, Title VII of the Civil Rights Act of 1964, as amended, the Age Discrimination in Employment Act, and the Americans with Disabilities Act.
3. The arbitrator's decision, in all disputes submitted to arbitration, shall be final and binding upon both parties as to all issues.

The initial question this Court must decide is whether Plaintiff's age discrimination claim falls within the ambit of these contractual provisions. Article 21, § 2, requires that Defendant follow federal laws against discrimination, including the ADEA, a federal anti-discrimination statute. Moreover, subparagraph (a) specifically proscribes age discrimination. Thus, pursuant to Article 21, the contract governs Defendant's alleged misconduct. Article 47 provides the grievance procedures available. Section 1 permits Plaintiff's union, with Defendant's approval, to submit disputes to arbitration. Section 2 provides that statutory rights, such as those Ms. McCoy asserts, are appropriate for arbitration. Finally, § 3 provides that once parties submit disputes to arbitration, the arbitration decisions are final and binding upon both parties.

The arbitrator's decision of the age discrimination dispute between Plaintiff and Defendant is thus binding if these provisions of the collective bargaining agreement between Defendant and Plaintiff's union are enforceable. Plaintiff argues that this agreement is unenforceable, however, because unions cannot waive the rights of bargaining unit

members to bring an action in court under anti-discrimination statutes like the ADEA. I agree.

The Supreme Court has held that unions cannot, through a collective bargaining agreement, waive the rights of individual employees to bring discrimination claims in court. See Alexander v. Gardner-Denver, 415 U.S. 36, 59 (1974). In Gardner-Denver, the Supreme Court permitted the claimant to pursue in court a race discrimination claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1994), even though an arbitrator, acting pursuant to a collective bargaining agreement, previously determined that the plaintiff was not the victim of race discrimination. See 415 U.S. at 42. The Court held that "an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective bargaining agreement." Id. at 49. Moreover, the Court held that there was "no suggestion in the statutory scheme [of Title VII] that a prior arbitral decision either forecloses an individual's right to sue or divests federal courts of jurisdiction." Id. at 47.

The Court further based its decision in Gardner-Denver on clear legislative intent. The Court determined that Congress had long demonstrated an intent to "accord parallel or overlapping remedies against discrimination." Id. (citing the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1994); Civil Rights Act of 1871, 42 U.S.C. § 1983 (1994)). Furthermore, the Court held that Congress did not intend arbitration to be the only forum for Title VII claims. See 415 U.S. at 48. Although Plaintiff asserts an ADEA claim, rather than a Title VII claim, given the similarity between the statutes[2] I find no basis for holding that

---

[2] The pertinent sections of the ADEA and Title VII, respectively, read as follows:

> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to

Congress intended a different result under the ADEA than it did under Title VII.

The Court reiterated the holding of Gardner-Denver in Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 737 (1981). In Barrentine, the Court considered a minimum-wage dispute between an employer and employee covered by a collective bargaining agreement. Id. at 730-31. The parties had submitted the dispute to arbitration, and the relevant collective bargaining agreement rendered all arbitration decisions final and binding. Id. at 731. The Court, however, refused to recognize the final and binding provision of the collective bargaining agreement and noted that "[n]ot all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining agreements." Id. at 737.

The majority of the courts that have considered the issue have also determined that collective bargaining agreements cannot require binding arbitration of statutory rights. In Bolden v. SEPTA, 953 F.2d 807, 811 (3d Cir. 1991), for example, the Court considered a claim by an employee who was terminated following a drug test that, although permissible under the collective bargaining agreement, the court determined was unconstitutional. The collective bargaining agreement

---

his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (1994)

> (a) Employer practices
>
> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

29 U.S.C. § 623 (1994).

provided for submitting the employee's discriminatory discharge claim to binding arbitration. Id. However, the court held that the union had no right to make agreements with the employer to arbitrate issues of the employee's statutory or constitutional rights. Id. In Sewell v. New York City Transit Auth., 809 F. Supp. 208, 211-12 (E.D.N.Y. 1992), moreover, the employee brought claims under the Civil Rights Act of 1964, 42 U.S.C. § 1983 (1994), and Title VII against the New York City Transit Authority for retaliatory, discriminatory discharge. The district court, relying on Gardner-Denver, held that it would be unfair to permit binding arbitration in the collective bargaining context because "union representation before an arbitrator may conflict with the interests of an individual plaintiff." Id. at 215-16.

Defendant asserts, however, that the Supreme Court's more recent decision in Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991), has overturned Gardner-Denver. The Gilmer Court held that an employee who was obligated by agreement to arbitrate a statutory discrimination claim was precluded from bringing an ADEA claim in court. See id. at 35. In Gilmer, however, unlike Gardner-Denver, the arbitration pledge was contained in an individual contract rather than in a collective bargaining agreement. Id. at 23.

The distinction between individual employment contracts and collective bargaining agreements is significant because unions, by nature, seek contract terms that would benefit the majority of the members of the bargaining unit. See Women, Labor Unions, and Hostile Environment Sexual Harassment: The Untold Story, 4 TEX. J. WOMEN & L. 9, 11 (1995).[3] It is thus conceivable that unions would agree to arbitration provisions in exchange for management concessions that would benefit the majority of members at the expense of minority

---

[3] The distinctions between Gilmer and Gardner-Denver have also been recognized by the majority of courts that have considered this issue. See, e.g., Crawford v. West Jersey Health Systems, 847 F. Supp. 1232, 1241 (D.N.J. 1994); Hull v. NCR Corp., 826 F. Supp. 303, 305 (E.D. Mo. 1993); DeCrisci v. Lyndon Guar. Bank of N.Y., 807 F. Supp. 947, 951 (W.D.N.Y. 1992); Dancu v. Coopers & Lybrand, 778 F. Supp. 832, 833 (E.D.P.A. 1991), aff'd mem., 972 F.2d 1330 (3d Cir. 1992).

members.[4] Unfortunately, it is generally those of minority status who are discriminated against in the workplace. Id. Because the ADEA was enacted to protect individuals from discrimination by majorities, the protection afforded by the ADEA is especially important in the collective bargaining context, and individuals must be able to litigate their claims. More important, in this case, the union had complete control over the arbitration process. Ms. McCoy could not bring her claim to arbitration without the union's consent, and under the collective bargaining agreement she was not entitled to represent herself at the hearing.

Finally, Defendant argues that disallowing binding arbitration of statutory rights under collective bargaining agreements would thwart the intent behind the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 (1994). Congress passed the FAA in 1925 to decrease the incessant backlog of cases to be adjudicated and to make courts more tolerant of arbitration as an alternative means of dispute resolution.[5] See Asplundh Tree Expert Co.v. Bates, 71 F.3d 592, 597 (6th Cir. 1995). Under the FAA, contracts that govern commercial transactions may include requirements to settle disputes arising therefrom by submitting the disputes to irrevocable, enforceable arbitration. See Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 406-07 (1967). In Gilmer, the Supreme Court never reached the question of the FAA's applicability to employment contracts; the petitioner in Gilmer never raised the issue, and the contract at issue in Gilmer was a securities registration agreement rather than a contract of employment.[6] 500 U.S. at 25 n.2.

---

[4] Unions often make wage and benefit matters a priority in negotiations. See, e.g., Thomas J. Campbell, The National Labor Relations Act After 50 Years, 38 STAN. L. REV. 991, 1006 (1986).

[5] The hostility toward arbitration that existed in English common law was adopted by American courts and was predicated on the theory that only judges could render justice. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. at 24 (1991).

[6] Section 1 of the FAA reads as follows:

§ 1 ['C]ommerce', as herein defined, means commerce among the

This Court finds, however, that Congress did not intend the FAA to apply to employment contracts.

Although the Supreme Court did not answer the FAA employment contract question in Gilmer, Justice Stevens did so in his dissent. See 500 U.S. at 39 (Stevens, J., dissenting). Citing to the drafters of the FAA, Justice Stevens argued that "the bill is not intended [to] be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it." Id. (quoting chairman of American Bar Association committee responsible for drafting bill before Subcommittee of Senate Committee on Judiciary, 67th Cong., 4th Sess., 9 (1923)). On the basis of this legislative intent, Justice Stevens concluded, as do I, that the FAA specifically excluded agreements between employees and employers. See 500 U.S. at 40 (Stevens, J., dissenting).

Thus, the FAA does not apply to employment contracts. Furthermore, there is an irreconcilable tension between the interests of collective bargaining units and the interests of its minority members. That tension renders binding arbitration agreements unfair in the collective-bargainingcontext. Because precious individual rights are at stake, this Court prefers to err, if at all, on the side of caution. I therefore find that Plaintiff is not procedurally barred from bringing this action. I will now consider the merits.

---

several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, *but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.*"

9 U.S.C. § 1 (1994) (emphasis added).

ADEA CLAIM

Ms. Julie McCoy alleges that Part Two of the College's Profit Plan constitutes an unlawful employment practice under the ADEA. Specifically, Ms. McCoy alleges that Part Two of the College's Profit Plan violates the ADEA because the Plan has a disparate impact on older professors. The issue was brought before an arbitrator in compliance with the collective bargaining agreement between the Union and the College. The arbitrator found that disparate impact claims are not cognizable under the ADEA and denied Ms. McCoy's claim on the merits. I find that disparate impact is a viable legal theory under the ADEA, but I deny Ms. McCoy's claim on the merits because the College has demonstrated business necessity as a defense for its Profit Plan.

DISPARATE IMPACT AND THE ADEA

Plaintiff offers several compelling arguments that convince this Court that disparate impact liability applies to the ADEA. First, Plaintiff argues that the ADEA was modeled in large part on Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a) (1994), and that this evidences Congress's intent that disparate-impact liability applies to the ADEA. I agree. In drafting the ADEA, Congress borrowed statutory language in large measure from Title VII. See Lorillard v. Pons, 434 U.S. 575, 584 (1978) (noting that "the prohibitions of the ADEA were derived in haec verba from Title VII"). The similarities in language between the two statutes are particularly evident when one compares § 2000e-2 (a)(2) of Title VII, which allows disparate impact claims, Griggs v. Duke Power Co., 401 U.S. 424, 428 (1971), with § 623(a)(2) of the ADEA. See also EEOC v. Governor Mifflin Sch. Dist., 623 F. Supp. 734, 740 (E.D. Pa. 1985) ("[T]he starting point [to interpreting the ADEA] must be the statute itself. In this case, the statute is the same as Title VII.").

Furthermore, as Plaintiff argues in her brief, both Title VII and

the ADEA share the same goal of eradicating discrimination in the workplace, and as such, causes of action available under the Title VII should also be available under the ADEA. In Lorillard v. Pons, 434 U.S. at 583, the Supreme Court noted that there are "important similarities between [Title VII and the ADEA]," particularly the statutes' purposes in eliminating discrimination in the workplace. 434 U.S. at 583. Since it is well established that disparate impact claims may be brought under Title VII, see Griggs, 401 U.S. at 428, this Court finds it logical that disparate impact also applies to ADEA claims.

I am most persuaded, however, by the Second Circuit's holding in Geller v. Markham, 635 F.2d 1027, 1036 (2d Cir. 1980), in which the Court applied a disparate impact analysis to the ADEA to find that a defendant school district's hiring practices had a discriminatory impact on older workers. In Geller, the court found that plaintiff had produced sufficient statistical evidence to prove that the school district's salary scale and hiring practices had a discriminatory impact on older teachers. See id. at 1034.

In addition, I am guided by the fact that several other circuits have already held that disparate impact may apply to ADEA claims. See Leftwich v. Harris-Stowe State College, 702 F.2d 686, 690 (8th Cir. 1983) (finding that defendant's faculty selection system had disparate impact on older faculty members); Governor Mifflin Sch. Dist., 623 F. Supp. at 741 (holding that disparate impact applies to ADEA). For these reasons, I find that disparate impact theory applies to the ADEA.

THE PROFIT PLAN AS AN UNLAWFUL EMPLOYMENT PRACTICE

(i) *Establishing a Prima Facie Case Under the ADEA*

Even though disparate impact claims are cognizable under the ADEA, Ms. McCoy must still show that the College's Profit Plan is an unlawful employment practice. To establish a prima facie case of

disparate impact, Ms. McCoy must demonstrate that the College's Profit Plan has a disparate impact on older professors. A plaintiff may establish disparate impact by presenting statistics that show that a facially neutral employment practice has a discriminatory effect on a protected class. Geller, 635 F.2d at 1033. Ms. McCoy has shown that Part Two of the College's Profit Plan has a disparate impact on older professors. She presented to the arbitrator, and I rely on this evidence, by a credible statistical expert, Dr. Adam Bricker, whose data shows that 87.4% of all college professors in the State of Wagner between the ages of forty and fifty-five have more than ten years experience and are paid more than $40,000 per year, while only 23% of all college professors between the ages of twenty-five and thirty-nine have more than ten years experience and only 13.9% are paid more than 40,000 per year. Accordingly, Ms. McCoy has established a prima facie case under a disparate impact theory. This is not enough, however, to show that the College's Profit Plan is an unlawful employment practice. Defendant can still prevail if it can demonstrate that the employment practice is job related and consistent with business necessity. See 42 U.S.C. § 2000e-2 § 105 (k)(1)(A) (1994).

(ii) *Business Necessity and Disparate Impact*

Once a plaintiff shows that an employment practice has a disparate impact, which Ms. McCoy has done in this case, the burden then shifts to the employer to demonstrate that the practice is supported by business necessity. The Civil Rights Act of 1991 overruled portions of the Supreme Court's decision in Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 656 (1989), which held that the burden falls on the plaintiff to persuade a court that business necessity exists. Section 105 of the Civil Rights Act of 1991 reinstates the burden first articulated in Dothard v. Rawlinson, 433 U.S. 321, 327 (1977), which requires that the employer bear the burden of persuasion to demonstrate that the challenged employment practice is job related and consistent with business necessity.

I find that the College has demonstrated a business necessity for its Plan. First, the College's asserted business purpose for the Profit Plan, to manage its budget better so that it may avoid the layoffs made necessary in 1991, is essential to the economic survival of the College. In 1991, the College had to close several campuses permanently and lay off over 250 personnel, most of whom were non-tenured professors, in order to stave off further financial hardship. The College continues to feel the effects of the layoffs, reflected mostly by its inability to attract a sufficient number of professors to teach classes at the School of Criminal Justice. One of the primary ways that the College can guarantee better job security to potential professors is to better manage the salaries paid to new professors. See Abbott v. Federal Forge, Inc. 912 F.2d 867, 875 (6th Cir. 1990) (observing that "minimizing the cost of labor is a legitimate business consideration"). The Profit Plan appropriately serves the purpose of minimizing labor costs to secure the financial stability of the business entity as a whole. Faced with the possibility of experiencing more campus closures if its financial circumstances are not tightly controlled, the College has demonstrated a business necessity sufficient to overcome any discriminatory impact that the Profit Plan may have on older professors.

Furthermore, the College argues that its primary business purpose in creating and implementing the Profit Plan is to bring financial stability to the College, to manage hiring new faculty and staff better, and to make more academic programs available to its students. Since the establishment of the Profit Plan in 1991, the College has made headway in accomplishing its goals. The College has been able to hire ten new assistant professors throughout the College system, offer five new courses at the School of Criminal Justice, and reinstate a previously closed degree program in art history. The College has made credible business decisions to maintain its financial health. Decisions such as these are best left to the businesses themselves. See Ackerman v. Diamond Shamrock Corp., 670 F.2d 66, 70 (6th Cir. 1982) (affirming district court's ruling that employer had legitimate business reasons to eliminate employee's job, although employee was over forty years old,

noting that "[t]he ADEA was not intended as a vehicle for judicial review of business decisions"). The College has demonstrated that the Profit Plan furthers its goal of maintaining the College's financial stability.

The College has tried a number of other unsuccessful options to raise money and to hire new professors. Fundraising drives, private donations, and past efforts at endowments have met with only moderate success. Part Two of the Profit Plan has allowed the College to enjoy the most expansion and the best fiscal health since it opened the School of Criminal Justice in 1972.

Therefore, I find that the College has met its burden of business necessity in this case.

THEREFORE, IT IS THIS COURT'S FINDING that Plaintiff is not procedurally barred from bringing this action. Furthermore, although disparate impact is applicable to ADEA claims, Puerta Pacific College has demonstrated business necessity for Part Two of its Profit Plan.

Judgment is entered for the College. Ms. McCoy's demand for backpay and reinstatement are hereby denied.

SO ORDERED, June 19, 1996.

/s/
C.C. Charo (U.S.D.J.)

UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

----------X

JULIE McCOY,

Plaintiff-Appellant,-
Cross-Appellee

v. **Docket No. 4444/96**

PUERTA PACIFIC COLLEGE,

Defendant-Appellee,-
Cross-Appellant.

----------X

Before M. Rork, T. DePlaine, and P. Princess, Circuit Judges

Tatoo DePlaine, *Circuit Judge*:

Introduction

Plaintiff-Appellant ("Appellant"), Julie McCoy, asserts that Defendant-Appellee("Appellee"), Puerta Pacific College, discriminated against her within the meaning of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634 (1994). The employer/employee relationship between the parties was governed by a collective bargaining agreement entered into between the Appellee and the Appellant's union, the American Union of College Professors, Local 522 ("AUCP"). The agreement contains a provision that forbids

discrimination, including statutorily proscribed discrimination.[1] The ADEA proscribes age discrimination.[2] Thus, Appellant's claim falls within the purview of the collective bargaining agreement. The agreement further provides that, at the request of either party, disputes such as Appellant's shall be submitted to arbitration, the result of which would be final and binding.[3] AUCP and the Appellee agreed to submit the Appellant's claim to arbitration pursuant thereto, and the arbitrator decided in Appellee's favor. Thereafter, Appellant brought suit under the ADEA in the District Court for the District of Wagner. The district court held that Appellant was not precluded from bringing a civil suit subsequent to arbitration but that Appellee had not discriminated against Appellant within the meaning of the ADEA. The parties filed cross-appeals with this Court. Appellant asserts that the district court erred in finding for Appellee on the discrimination issue. Appellee asserts that the district court did not have jurisdiction to hear the matter, given the language of the collective bargaining agreement. Because we agree with Appellee that the district court lacked jurisdiction, we need not consider the merits of Appellant's ADEA claim.

Discussion

The issue before this Court is whether a union can require

---

[1] The relevant portion of the collective bargaining agreement reads: "2. All parties hereto shall comply with all federal, state, and local statutes and regulations proscribing discrimination."

[2] The ADEA provides that "[i]t shall be unlawful for an employer to limit, segregate, or classify his employees in a way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. § 623 (a)(2) (1994).

[3] The relevant portions of the provision read: "1. All disputes not settled pursuant to any grievance procedure provided for herein shall, at the request of either party, be referred to final and binding arbitration. . . . 3. The arbitrator's decision, in all disputes submitted to arbitration, shall be final and binding on both parties as to all issues." (From Article 47 of the collective bargaining agreement).

employees to submit statutory discrimination claims to binding arbitration. This is a case of first impression in this Court, and the Supreme Court has never decided the issue. However, the claim in Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991), was similar enough to the claim in this case to provide us with guidance.

Application of Gilmer

In Gilmer, a financial services manager brought an age discrimination claim under the ADEA. See 500 U.S. at 23. As a condition of his employment, the claimant had signed a broker's registration agreement with the New York Stock Exchange. Id. This agreement contained an arbitration clause that required him to submit statutory discrimination claims to arbitration. Id. The claimant bypassed this requirement, however, bringing suit in federal court instead. Id. He asserted that arbitral fora are inappropriate for resolving statutory rights disputes. Id. The Supreme Court rejected his argument, recognizing that "it is by now clear that statutory claims may be the subject of an arbitration agreement." Id. at 26.

Likewise, in the case at bar, Appellant brought an ADEA claim in federal court, asserting that arbitration was an inappropriate vehicle to adjudicate her statutory claim. Her claim must similarly be rejected.

Appellant argues in her brief that Gilmer is inapplicable to her case because Gilmer involved a broker's registration agreement, not an employment contract, and because a union did not negotiate the arbitration agreement in Gilmer. Neither of these distinctions, however, is sufficient to render Gilmer inapplicable.

A. Contractual Analysis

We do not subscribe to Appellant's theory that the registration agreement in Gilmer is meaningfully distinguishable from the collective

bargaining agreement at issue here. The Court in Gilmer stressed that entering into the registration agreement was a prerequisite to the claimant's employment. See 500 U.S. at 23. The Court further noted that the registration agreement functioned as an employment contract to the extent that it governed "[a]ny controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative." Id. Both of these conditions serve to blur any distinction between the contracts at issue.

Moreover, Appellant's argument is inconsistent with the language and intent of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16 (1994). The FAA "requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989).

Notwithstanding Justice Steven's dissent in Gilmer, 500 U.S. at 39, and the district court's reliance on it, the FAA does not exclude all employment contracts from its coverage. See 9 U.S.C. § 1. Rather, as the majority of courts have held, the employment contract exceptions to the FAA are narrow, including only those of seamen, railroad employees, and those involved in interstate commerce. See, e.g., Pietro Scalzitti Constr. Co. v. International Union of Operating Eng'rs., Local No. 150, 351 F.2d 576 (7th Cir. 1965) (holding that interstate commerce includes bus and truck drivers); DeCrisci v. Lyndon Guar. Bank of N.Y., 807 F. Supp. 947 (W.D.N.Y. 1992) (holding that Congress did not intend FAA to exclude all employment contracts).

Appellant's employment with Appellee was neither as a seaperson or railroad employee, nor could the activities of her employment be described as involving interstate commerce in any way. The FAA is thus applicable to Appellant's employment contract.

We further base our decision to apply the FAA in cases such as the one before us on the strong policy reasons behind the Act. Congress enacted the FAA in 1923 in part to serve the vital function of decreasing the backlog in the courts. See Scherk v. Alberto-Culver Co., 417 U.S.

506, 511 (1974). We are concerned that, despite the positive effects of the FAA, namely the trend toward arbitration, the caseload of statutory disputes arising in the workplace is still increasing. The Equal Employment Opportunity Commission, for example, is presently facing a backlog of more than 100,000 employment discrimination claims. In Support of Mandatory Arbitration of Statutory Employment Disputes, NYSBA Labor and Employment Law Section Newsletter (NYSBA/ Evan J. Spelfogel), June 1996, Vol. 21, No. 2. Moreover, new cases are coming in at a rate twenty percent higher than last year. Id. Finally, over 25,000 discriminatory discharge cases are pending in the federal courts. Id. This trend cannot be permitted to continue. Courts simply cannot handle the volume. Thus, because arbitration has proven to be a useful and meaningful surrogate for the court system, our court is anxious to expand, not contract, the use of arbitration. This includes allowing binding arbitration under employment contracts.

B. Individual Employment Contracts versus Collective Bargaining Agreements

Appellant also asserts that Gilmer is inapplicable to this case because the claimant in Gilmer individually entered into an arbitration agreement. See 500 U.S. at 23. In contrast, the arbitration clause at issue here was negotiated by the AUCP as part of a collective bargaining agreement. Appellant's brief suggests several problems unique to collective bargaining agreements. First, Appellant contends that arbitration unfairly favors employers. However, as the Supreme Court held in Gilmer, "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." 500 U.S. at 33. Appellant also expresses concern that an individual's interests may be subordinated to those of the collective bargaining unit. In fact, the Supreme Court did voice these concerns in both Gilmer, 500 U.S. at 35, and Alexander v. Gardner-Denver, 415 U.S. 36, 58 n.19 (1974). However, merely

because the Court expressed concern does not indicate that it intended to foreclose the debate. We find that, although valid, these concerns are counter-balanced by existing safeguards. The Supreme Court has held, for example, that unions have an implied statutory obligation to represent each employee fairly. See Vaca v. Sipes, 386 U.S. 171, 177 (1967); Ford Motor Co. v. Huffman, 345 U.S. 330, 337 (1953); Steele v. Louisville & Nashville Ry., 323 U.S. 192, 202 (1944). The Court has also held that the duty of fair representation applies not only to a union's contract administration but to negotiation tactics as well. Air Line Pilots Ass'n Int'l v. O'Neill, 499 U.S. 65, 77 (1991). We therefore find that the interests of employees under collective bargaining agreements are sufficiently protected and will not be jeopardized by permitting unions to contract for binding arbitration of statutory rights.

In reaching our decision, we note that several courts have reached the opposite conclusion. See, e.g., Bolden v. SEPTA, 953 F.2d 807, 825 (3d Cir. 1991) (holding that arbitrating § 1983 claim under collective bargaining agreement does not preclude later litigation); Rosen v. Transx Ltd., 816 F. Supp. 1364 (D. Minn. 1993); Sewell v. New York City Transit Auth., 809 F. Supp. 208 (E.D.N.Y. 1992). These cases are distinguishable, however, from the case at bar because the collective bargaining agreement at issue in each case did not expressly include the arbitration of statutory rights disputes. See Bolden, 953 F.2d at 825; Rosen, 816 F. Supp. at 1366-67; Sewell, 809 F. Supp. at 214. In contrast to those cases, the collective bargaining agreement between Appellant and Appellee expressly includes statutory rights disputes as qualified for binding arbitration.

We consider the Fourth Circuit's analysis more relevant and more persuasive than that of the aforementioned cases. See Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir. 1996). In Austin, a discharged employee brought an action under the Americans With Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101-12202 (1994), against her former employer. See 78 F.3d at 885. As in this case, the collective bargaining agreement between Owens-Brockway and the union in that case specifically allowed for binding arbitration of

statutory claims. Id. The Fourth Circuit held that such a requirement in the collective bargaining agreement was permissible, reasoning that, because "unions may waive the right to strike and other rights," there is no reason to hold that they cannot similarly waive statutory rights. Id. at 885.

Furthermore, there is no legal foundation for Appellant's assertion that collective bargaining agreements differ in any meaningful way from individual agreements. To the contrary, we believe it likely that employees receive more protection when binding arbitration clauses are negotiated by experienced, knowledgeable union representatives than when employees negotiate contracts individually. Indeed, it is the skill and knowledge of union negotiators that levels the playing field during labor negotiations. It would thus be illogical to assume that an individual can negotiate a more protective contract than a union can.

Applicability of Gardner-Denver

Rather than relying on Gilmer, the court below improperly relied on Gardner-Denver. This case is quite distinguishable from Gardner-Denver, however, because the arbitration clause there did not include statutory rights as the arbitration clause does here. See 415 U.S. at 39-40.

As the Court noted in Gardner-Denver, the arbitrator who initially heard the claimant's race discrimination claim had the authority to resolve only contractual questions. 415 U.S. at 37. Because the collective bargaining agreement in that case did not include the arbitration of statutory rights, the arbitrator's decision was based solely on contractually defined discrimination. Id. The Court held that the claimant, "in instituting an action under Title VII, [was] not asserting a statutory right independent of the arbitration process." Id. at 54. The holding of Gardner-Denver is thus inapplicable to this case because implicit in the Court's holding is the concept that had the contract called for statutory rights arbitration, the determination of rights thereunder

would have been within the arbitrator's authority.

Conclusion

Gilmer provides the appropriate precedent for us to follow. Under the dictates of Gilmer, binding arbitration of Appellant's ADEA claim was appropriate. As such, the district court did not have jurisdiction to try the matter. Moreover, we reaffirm our intention to adhere strictly to the FAA in all cases other than those specifically precluded by Congress. Appellant's claim is dismissed without opinion as to the disparate impact issue that Appellant raises.

Dismissed.

IN THE SUPREME COURT OF THE UNITED STATES

----------X

JULIE McCOY,

Petitioner,

v. **Docket No. 97-5969**

PUERTA PACIFIC COLLEGE,

Respondent.

----------X

ORDER GRANTING CERTIORARI

The petition for a writ of certiorari to the United States Court of Appeals for the Thirteenth Circuit to review the decision in McCoy v. Puerta Pacific College, 600 F.3d 322 (13th Cir. 1996), is granted to review the following questions:

1. Is a union's agreement, as part of a collective bargaining agreement that requires bargaining unit members to submit statutory rights disputes to binding arbitration, enforceable?

2. Should disparate impact liability be recognized under the Age Discrimination in Employment Act, 29 U.S.C. § 623 (1994), and, if so, has Respondent succeeded in establishing business necessity?